IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

SPECIAL CIVIL APPLICATION No. 6802 of 2003
With
SPECIAL CIVIL APPLICATION No. 13535 of 2003
With
SPECIAL CIVIL APPLICATION No. 13557 of 2003
With
SPECIAL CIVIL APPLICATION No. 13559 of 2003
With
SPECIAL CIVIL APPLICATION No. 13560 of 2003
With
SPECIAL CIVIL APPLICATION No. 13562 of 2003
With
SPECIAL CIVIL APPLICATION No. 13563 of 2003
With
SPECIAL CIVIL APPLICATION No. 13565 of 2003
With
SPECIAL CIVIL APPLICATION No. 13566 of 2003

For Approval and Signature:

HON'BLE MR JUSTICE M.R. SHAH

==========

1 Whether Reporters of Local Papers may be allowed to see the judgment ?

2 To be referred to the Reporter or not ?

3 Whether their Lordships wish to see the fair copy of the judgment ?

4 Whether this case involves a substantial question of law as to the interpretation of the constitution of India, 1950 or any order made thereunder ?

5 Whether it is to be circulated to the civil judge ?

==========

MANAGER A.M.T.S. & 1 - Petitioner(s)

Versus

JAYPRAKASH SHIVSHANKAR SHARMA & 8 - Respondent(s)

==========

Appearance :

Mr. S.N. Shelat, Advocate General with MR MG NAGARKAR for Petitioner No(s).: 1,2.

MR VM DHOTRE for Respondent No(s).: 1, 2, 3, 4, 5, 6, 7, 8,9.

==========

CORAM :HON'BLE MR JUSTICE M.R. SHAH

Date : 10/08/2005

CAV

In all these petitions, common questions of law and facts arise and therefore they are being disposed of by this common judgment and order.

2. By way of these petitions, the common petitioners, Ahmedabad Municipal Transport Service as well as Ahmedabad Municipal Corporation have challenged the legality and validity of the common judgment and order passed by the Industrial Tribunal, Ahmedabad, dated 24.12.2002 in Complaint (IT) No.52/2002, Complaint (IT) No. 56/2002, Complaint (IT) No. 57/2002, Complaint (IT) No. 62/2002, Complaint (IT) No. 64/2002, Complaint (IT) No. 70/2002, Complaint (IT) No. 87/2002, Complaint (IT) No. 88/2002, and Complaint (IT) No. 92/2002 filed by the concerned respondent workmen (hereinafter referred to as “the workmen”) filed under Section 33-A of The Industrial Disputes Act, 1947 [“the I.D. Act” for short] by which the Industrial Tribunal has partly allowed the said complaints directing the petitioners to make all the concerned workmen permanent as per their seniority on completion of 5 years and further directing the petitioners to run

612 buses as per Schedule dated 15th January 2002 from 15th January 2003. A further order is also passed directing the petitioners to pay all the consequential benefits flowing from the aforesaid order with effect from 15th January 2003.

3. All the concerned workmen were serving as 'daily-rated drivers and conductors'. Some of the daily-rated workmen working in the petitioners' transport service raised an industrial dispute inter alia claiming the benefits available to permanent staff working in the Ahmedabad Municipal Transport Service (AMTS) on completion of 240 days in one year and whether the said benefit should be granted from 1.1.2000 or not. It appears from the record, that all the concerned workmen claim to be beneficiaries of the positive result of the said Demand No.8. As during the pendency of the said Reference, according to them, there was change in service conditions and therefore they had submitted the aforesaid complaints to the Industrial Tribunal, Ahmedabad under Section 33-A of the I.D. Act. It was the contention on behalf of the concerned workmen that a policy decision has been taken by the petitioners on the basis of some settlement/award of the Industrial Tribunal that on completion of 5 years and 900 days a daily-rated workman shall be made permanent, but on completion of 5 years and 900 days

the concerned workmen were not made permanent during the pendency of the aforesaid Reference which has

resulted into change in service condition and breach of Section 33 of the I.D. Act is committed. It was also further contended on behalf of the concerned workmen that as per the work schedule of 15th January , 2002 there were 612 buses plying on the road and the concerned workmen were also provided and offered the work as daily-rated workmen. However as the said work schedule had been revised to run less number of buses than 612 buses there is a change of service condition for which no approval is sought as required under Section 33 of the I.D. Act which led to breach of Section 33 and therefore by making aforesaid contentions and submissions it was requested to pass an order directing the petitioners to ply 612 buses as per the earlier schedule dated 15th January 2002 and make all concerned workmen permanent on completion of 5 years and 900 days and also to pay the backwages accordingly.

4. All the aforesaid complaints were opposed by the petitioners by contending inter alia that the concerned workmen were not at all connected with the Reference (IT) No. 137 of 2001 which was pending before the Tribunal and therefore the said complaints were not maintainable in law. It was also further contended that all the concerned workmen were working as daily-rated workmen; they are continued as such;

and the petitioners had not effected any change affecting the service conditions of the respondents pending the said Reference. It was also further

contended that the subject matter of the Reference pending before the Industrial Tribunal is entirely different from the subject matter of the complaints and therefore the said complaints were not maintainable in law. It was also further submitted that it was not the policy nor was there any resolution of the petitioners that on completion of 5 years and 900 days automatically irrespective of availability of post/s the concerned workmen will be made permanent. It was submitted that as and when posts fall vacant on those posts the concerned daily-rated workmen who had completed 5 years and 900 days may be made permanent as per their seniority and therefore the contention on behalf of the concerned workmen that on completion of 5 years and 900 days as they are not made permanent during the pendency of the aforesaid Reference which has resulted into change of service condition leading to breach of provisions of Section 33 cannot be accepted. It was also further submitted that in fact due to deteriorating financial condition of the petitioners and due to other concrete reasons 131 buses were decided to be scrapped and accordingly such buses were withdrawn altering the schedule of routes; due to reduction of buses in fact the permanent drivers and conductors were required to be retained at heavy cost viz., 1600 drivers and 1750 conductors were required to be paid salaries eventhough there was no work at all for those drivers and conductors; some of them had to sit idle because of reduction in number of buses to whom idle salaries were required to be

paid; and therefore it was requested to dismiss all the complaints.

5. The Industrial Tribunal, Ahmedabad, after hearing the learned advocates appearing for the parties, by Judgment and Order dated 24.12.2002 partly allowed all the aforesaid complaints and held that by not making the concerned workmen permanent in their service on completion of 5 years and 900 days there is a breach of Section 33 of the I.D. Act. It is also held by the Tribunal that there is change of service condition by not making them permanent during the pendency of the of aforesaid Reference and because of the action of the petitioners in reducing the number of buses from 612 as per the schedule dated 15th January 2002 there is change of service condition and accordingly partly allowed the aforesaid complaints by directing the petitioners to make all the concerned workmen permanent as per their seniority on completion of 5 years and 900 days, and by further directing the petitioners to run 612 buses as per the schedule dated 15th January 2002 and to pay the wages on the basis of the said schedule as if they were required to be offered the work as per the schedule of 612 buses with effect from 15th January 2003. Being aggrieved and dissatisfied with the judgment and order passed by the Industrial Tribunal dated 24.12.2002 in Complaint (IT) No. 52 of 2002 and other allied matters, the petitioners have preferred the present Special Civil Applications under Article

226/227 of the Constitution of India.

6. Shri S.N. Shelat, learned Advocate General appeared with Mr. N.G. Nagarkar, learned advocate on behalf of the petitioners. Shri V.M. Dhotre, learned advocate appeared on behalf of the concerned workmen. Shri S.N. Shelat, learned Advocate General appearing on behalf of the petitioners had assailed the judgment and order passed by the Industrial Tribunal in aforesaid complaints by making the following submissions and raising the following contentions:

(1) All the concerned workmen were daily-rated workmen and as and when work was available they were offered work.

(2) That when the concerned workmen are not at all connected and concerned with the Reference (IT) No. 137/2001 which is pending before the Industrial Tribunal the complaints made by them under Section 33-A are not maintainable in law.

(3) The subject matter of the Reference and the demands made in Reference (IT) No. 137/2001 and that of the complaints under Section 33-A were different from one another and therefore the said complaints are not maintainable in law.

(4) As all the concerned workmen are serving as daily-rated workmen they are continued to be treated as the daily-rated workmen by the petitioners and the petitioners had not effected any change affecting the service conditions of the concerned workmen pending the Reference and therefore also the complaints are not maintainable in law.

(5) It is not that as per the Resolution and policy of the petitioners on completion of 5 years and 900 days automatically the concerned workmen were to be made permanent. The concerned workmen are to be made permanent subject to availability of post/s on completion of 5 years and 900 days, and in the present scenario when the permanent workmen, i.e., drivers and conductors were paid idle salaries without their being any work due to reduction of buses, financial constraints, scrapping of buses and other factors there was no question of making the concerned workmen permanent on completion of 5 years and 900 days and as such by not making them permanent no change in service condition which may be said to be prejudicial to the interests of the concerned workmen as contemplated under Section 33 of the I.D. Act has occurred and therefore when there is no breach of Section 33 of the I.D. Act the complaints under Section 33-A could not have been entertained by the Tribunal and it should have dismissed the same.

(6) All the concerned workmen were daily-rated workmen and as and when work was available and in event permanent employee was not available the daily-rated workmen were offered the work. The concerned workmen were not having any right to get work every day. Due to financial constraints, 170 buses were required to be scrapped and they were withdrawn from the road and therefore there was a change in the schedule. Under the circumstances, not offering work to the concerned workmen for which even otherwise they do not have any right it cannot be said that there is change in service condition. The Industrial Tribunal ought not to have directed the petitioners to run 612 buses on the road as per the schedule dated 15th January 2002 irrespective of availability buses and to offer the work to concerned workmen.

7. Shri S.N. Shelat, the learned Advocate General, while reiterating what was submitted as stated above, has further submitted that as such there is no breach of any policy and as and when vacancy arises the concerned workmen were to be made permanent as per their seniority on completion of 5 years and 900 days. In view of the fact that when even the permanent workmen, because of non-availability of work due to reduction of buses are paid salaries/idle wages, are made to sit idle

without work, there was no question of making the concerned workmen permanent on completion of 5 years and 900 days and therefore there is no breach of Section 33, more particularly no change of service condition of the concerned workmen as daily-rated workers, and they continued to be daily-rated workmen during the pendency of the Reference. It is further submitted that even in case a Reference under Section 10 of the I.D. Act is there to make the concerned workmen permanent as per the policy and/or resolution of the petitioners. The Court would not have granted the relief unless there are vacant posts. It is also submitted that all the concerned workmen being daily-rated workmen who do not have any right to posts in absence of any work the Tribunal ought not to have passed the order of regularization and/or making them permanent. It is, therefore, requested to allow the present Special Civil Applications.

8. Relying upon the Judgment of the Hon'ble Supreme Court in the case of Blue Star Employees' Union Vs. Ex. Off. Principal Secy. To Government & Anr., reported in JT 2000 (Suppl.1) S.C. 70, it is submitted that as held by the Supreme Court in the aforesaid decision, “Section 33-A of the Act involves consideration of two aspects of the matter, firstly, whether there has been any violation or contravention of the provisions of Section 33 of the Act and secondly, whether the act

complained of is justified or not. Therefore, violation or contravention of the provisions of Section 33 of the Act would be the justification for the authority concerned to entertain an application under Section 33-A of the Act." It is submitted that what is contemplated under Section 33 of the Act is that during the pendency of any conciliation proceeding before a Conciliation Officer or any proceeding before the arbitrator or a Labour Court or Tribunal no employer shall in regard to any matter connected with the dispute alter to the prejudice of the workman concerned in such dispute, the conditions of service applicable to them immediately before the commencement of such proceedings save with the expressed permission in writing of the authority before which the proceeding is pending. It is submitted that therefore one has to consider what would be the change in conditions of service. Shri Shelat has submitted that Section 9-A of the Act is with regard to notice of change and only with regard to those matters which are specified in the Fourth Schedule, if there is any change, the same can be said to be change in conditions of service applicable to any workman. It is submitted that considering the 4th Schedule not making the concerned workmen permanent is not within the 4th Schedule and therefore also there is no change and hence Section 33 is not applicable bar under Section 33 is not operative and therefore the complaints must fail.

9. Shri Shelat, the learned Advocate General has further relied upon the Judgment of the *Hon'ble Supreme Court* in the case of Karnataka State Road Transport Corporation and Anr. vs. S.G. Kotturappa and Anr., reported in J.T 2005 (3) S.C. Page 20, in particular paragraphs No. 12, 18 and 23 thereof, in support of his submission that the badli worker does not enjoy a status and he does not hold a civil post. Therefore the concerned workmen who were daily-rated workmen were not having any right to get the work every day and as such they were offered the work as and when work was available. The learned Advocate General has also drawn the attention of this Court to paragraphs No. 8, 9, 13 and 17 of the decision of the Division Bench of this Court rendered in the case of A'bad Dairy Vs. Manjibhai Dhanjibhai, reported in 2000 (3) G.L.H. Page 409, to emphasize that 'Badli worker gets employment only when a regular workman is absent or on leave and he gets employment only as a substitute.' Shri Shelat has further submitted that when it is specifically held by the Industrial Tribunal that inspite of the 612 buses schedule, less number of buses are plying on the road and even the permanent drivers and conductors are being paid the idle wages it is possible that the daily-wagers workmen may not get the work also, the Tribunal was not justified in directing the petitioners to ply 612 buses as per the schedule of 15th January 2002 with effect from 15th

January 2003. To put it in other words, though buses are not available, pursuant to the direction issued by the Tribunal, the petitioners are required to run 612 buses, and such a direction is not only arbitrary but perverse which requires to be quashed and set aside. It is, therefore, requested to allow all the Special Civil Applications.

10. Per contra, Shri V.M. Dhotre, learned advocate appearing on behalf of the concerned workmen has firstly relied upon the directions issued by the Tribunal impugned in the present Special Civil Application. It is further submitted that in the year 2000-2001, the petitioners did make the workmen permanent who had completed 5 years and 900 days and therefore on completion of 5 years and 900 days as the concerned workmen are not made permanent during the pendency of the Reference No. 137/2001, there is a change of condition of service of the concerned workmen as envisaged under Section 33 of the I.D. Act and therefore the Tribunal has rightly entertained the complaints under Section 33-A of the I.D. Act by directing the petitioners to make all the workmen permanent on completion of 5 years and 900 days as per their seniority which is neither illegal nor contrary to the policy and resolution of the petitioners. It is also further submitted that the direction issued by the Tribunal to run 612 buses as

per the schedule dated 15th January 2002 is also just and proper as by reduction of the buses and effecting change in schedule the concerned workmen are not offered the work; not providing work is also change of service condition which is prejudicial to the concerned workman; Section 33 is therefore rightly attracted; and the complaints under Section 33-A are rightly allowed by the Tribunal by directing the petitioners to run 612 buses as per the schedule dated 15th January 2002 with effect from 15th January 2003. It is further submitted that if there is any justifiable reason the concerned petitioners would have approached the Industrial Tribunal and would have sought the permission but as no permission/approval is sought there is breach of Section 33 of the I.D. Act, and since all the complaints are rightly allowed by the Tribunal it is requested to dismiss all the petitions.

11. Heard the learned advocates appearing on behalf of the parties. It is not in dispute that all the concerned workmen are serving as daily-rated workmen and as and when work is available, in event a permanent employee is on leave or absent the daily-rated workman is offered work. It is not in dispute that the daily-rated workmen are by and large badli workers. They do not hold any post and they do not have any right to get the work as a matter of right

and as and when work is available they are to be provided and/or offered work. The demand, which was made in Reference (IT) No. 137 of 2001 and relied upon by the concerned workmen, is Demand No.8 which is in relation to Workshop Traffic Office Staff, Clerical Staff and other staff working in the AMTS who are newly appointed and the issue was as to whether they should be made permanent on completion of 240 days in one year or not. This Court, at present, does not propose to go into the question whether the concerned workmen were connected or concerned with the said Reference (IT) No. 137 of 2001 or not, as, for the reasons stated hereinafter, the petitions are required to be allowed on other grounds.

12. The concerned workmen had approached the Industrial Tribunal by way of Complaints under Section 33-A of the I.D. Act for violation and breach of provisions of Section 33 of the I.D. Act. Therefore, it is necessary to find out firstly as to whether in fact there is any breach of Section 33 of the I.D. Act or not and whether the complaints under Section 33-A of the I.D. Act were maintainable or not. Section 33 of the Act reads as under;

> **“33. Conditions of service, etc., to remain unchanged under certain circumstances during pendency of**

proceedings.___

(1) During the pendency of any conciliation proceeding before a conciliation officer or a Board of any proceedings before [an arbitrator or] a Labour Court or Tribunal or National Tribunal in respect of an industrial dispute, no employer shall,___

(a) in regard to any matter connected with the dispute, alter, to the prejudice of the workmen concerned in such dispute, the conditions of service applicable to them immediately before the commencement of such proceeding; or

(b) for any misconduct connected with the dispute, discharge or punish, whether by dismissal or otherwise, any workman concerned in such dispute,

save with the express permission in writing of the authority before which the proceeding is pending.

(2) During the pendency of any such proceeding in respect of an industrial dispute, the employer may, in accordance with the standing orders applicable to a workman concerned in such dispute [or, where there are no such standing orders, in accordance with the terms of the contract, whether express or implied, between him and the workman],___

(a) alter, in regard to any matter not connected with the dispute,

the conditions of service applicable to that workman immediately before the commencement of such proceeding; or

(b) for any misconduct not connected with the dispute, discharge or punish, whether by dismissal or otherwise, that workman:

Provided that no such workman shall be discharged or dismissed, unless he has been paid wages for one month and an application has been made by the employer to the authority before which the proceeding is pending for approval of the action taken by the employer.

(3) Notwithstanding anything contained in sub-section (2), no employer shall during the pendency of any such proceeding in respect of an industrial dispute, take any action against any protected workman concerned in such dispute_____

(a) by altering, to the prejudice of such protected workman, the conditions of service applicable to him immediately before the commencement of such proceedings; or

(b) by discharging or punishing, whether by, dismissal or otherwise, such protected workman,

save with the express permission in writing of the authority before which

the proceeding is pending."

(4) xxx xxx xxx

5) xxx xxx xxx

Section 33-A of the Act reads as under;

> **"33-A. Special provision for adjudication as to whether conditions of service, etc., changed during pendency of proceedings.**___ Where an employer contravenes the provisions of Section 33 during the pendency of proceedings [before a conciliation officer, Board, an arbitrator, a Labour Court, Tribunal or National Tribunal], any employee aggrieved by such contravention, may make a complaint in writing, [in the prescribed manner,___
>
> (a) to such conciliation officer or Board, and the conciliation officer of Board shall take such complaint into account in mediating in, and promoting the settlement of such industrial dispute; and
>
> (b) to such arbitrator, Labour Court, Tribunal or National Tribunal and on receipt of such complaint, the arbitrator, Labour Court, Tribunal or National Tribunal, as the case may be, shall adjudicate upon the complaint as if it were a dispute referred to or pending

before it, in accordance with the provisions of this Act and shall submit his or its award to the appropriate Government and the provisions of this Act shall apply accordingly.]"

12.1. As per Section 33 of the Act, during the pendency of any proceeding either before the Conciliation Officer or before the Labour Court or Tribunal, no employer shall in regard to any matter connected with the dispute, alter to the prejudice of the workman concerned any such dispute the conditions of service applicable to them immediately before the commencement of such proceedings save with the express permission in writing of the authority before which the proceeding is pending. All the concerned workmen were serving as daily-rated workmen. It is not in dispute that they are continued in that capacity as daily-rated workmen. Therefore, when the concerned workmen were serving as daily-rated workmen immediately before the commencement of proceedings of Reference (IT) No. 137/2001 and during the pendency of such proceedings they continued in that capacity, there is no breach of Section 33 of the I.D. Act. Hence, the complaints under Section 33-A were not maintainable at all.

13. So far as the contention, on behalf of the

concerned workmen, which has been accepted by the Industrial Dispute, that as per the Resolution and policy of the petitioners all the concerned workmen were to be made permanent on completion of 5 years and 900 days automatically, but on completion of 5 years and 900 days the concerned workmen are not made permanent during the pendency of the aforesaid Reference and the same is changing the service condition of the workmen, is concerned, first of all, it is required to be noted that it is the case of the petitioners that it is not that on completion of 5 years and 900 days automatically a workman is to be made permanent. According to the petitioners, they are to be made permanent subject to availability of vacant permanent posts. In the present case, even the permanent drivers and conductors are being paid idle wages due to non-availability of work and the buses/routes, as a result of which even the concerned workmen were not in a position to get work on daily-wage basis also. Therefore, there was no question of making them permanent even on completion of 5 years and 900 days as daily-rated workmen. The contention that by not making them permanent on completion of 5 years and 900 days as daily-rated workmen during the pendency of the aforesaid Reference,can be said to be change in service conditions which led to breach of Section 33 of the I.D. Act, if accepted, it would be stretching too much more particularly in view of the factual scenario where the permanent employees namely

drivers and conductors are being paid idle wages due to non-availability of work and reduction in number of buses, which is even conceded by the Tribunal also. Under the circumstances, by not making the concerned daily-rated workmen permanent on completion of 5 years and 900 days during the pendency of the Reference it cannot be said to be change in service condition of the concerned workmen who were and are the daily-rated workmen and who are continued in that capacity nor that it has led to breach of Section 33 of the I.D.Act. In such facts and circumstances and in law therefore the complaints under Section 33-A of the I.D. Act were not maintainable. The Industrial Tribunal has materially erred in directing the petitioners to make the concerned workmen permanent on completion of 5 years and 900 days by holding that there is breach of Section 33 of the I.D. Act.

14. So far as the further direction issued by the Industrial Tribunal on the petitioners to run the 612 buses as per schedule dated 15th January 2002 is concerned, such a direction is not only arbitrary and illegal but also beyond the scope of Sections 33 and 33-A of the I.D. Act. It is an admitted position that the financial condition of the petitioners is not sound and due to this amongst other factors the petitioners had to effect reduction in number of buses plying on the road which is evident from the

fact that 131 buses were withdrawn. Therefore, by virtue of the aforesaid direction, the petitioners will be compelled to ply 612 buses though the buses are not available. It is required to be noted here that all the concerned workmen were serving as daily-rated workers and they were offered the work as and when it is available. Considering the aforesaid reasons and the precarious position of the AMTS where the AMTS is facing financial crisis and inspite of such sorry state of affairs of the AMTS and when the permanent workmen are being paid the salary/idle wages without there being any work or buses, even in absence of any right in favour of the concerned workmen to get work, such a direction could not have been issued by the Industrial Tribunal. Even in absence of any right accrued in favour of the concerned workmen who were working as daily-rated workmen and who were offered work as and when it was available and due to reduction of buses the petitioners cannot stick to the Schedule dated 15th January 2002 of running 612 buses and if the concerned workmen are not offered the work more particularly in the factual scenario where the permanent workmen, i.e., drivers and conductors are being paid idle wages, it cannot be said that there is a change in the conditions of service of the concerned workmen and it has led to breach of Section 33 of the I.D. Act. Under the circumstances, even the complaints under Section 33-A of the ID Act were

also not maintainable.

15. For the foregoing reasons, it is to be held that provisions of Section 33 of the I.D. Act are not violated and therefore the complaints under Section 33-A of the Act are not maintainable at all. The judgments and orders passed by the Industrial Tribunal, allowing the aforesaid Complaints, are required to be quashed and set aside. The common judgment and order passed by the Industrial Tribunal, Ahmedabad, dated 24.12.2002 in Complaint (IT) No. 52 of 2002 and other allied matters, the particulars of which are stated hereinabove, is hereby quashed and set aside. All the petitions succeed and are allowed. Rule is made absolute to the aforesaid extent in each of the matter. However, there will be no order as to costs.

[M.R. Shah, J.]

RMR.